No. 87-737

In The

Supreme Court of the United States

October Term, 1987

NICHOLAS R. PIZZITOLO,

Petitioner,

vs.

ELECTRO-COAL TRANSFER CORPORATION and NATIONAL UNION FIRE INSURANCE COMPANY,

Respondents.

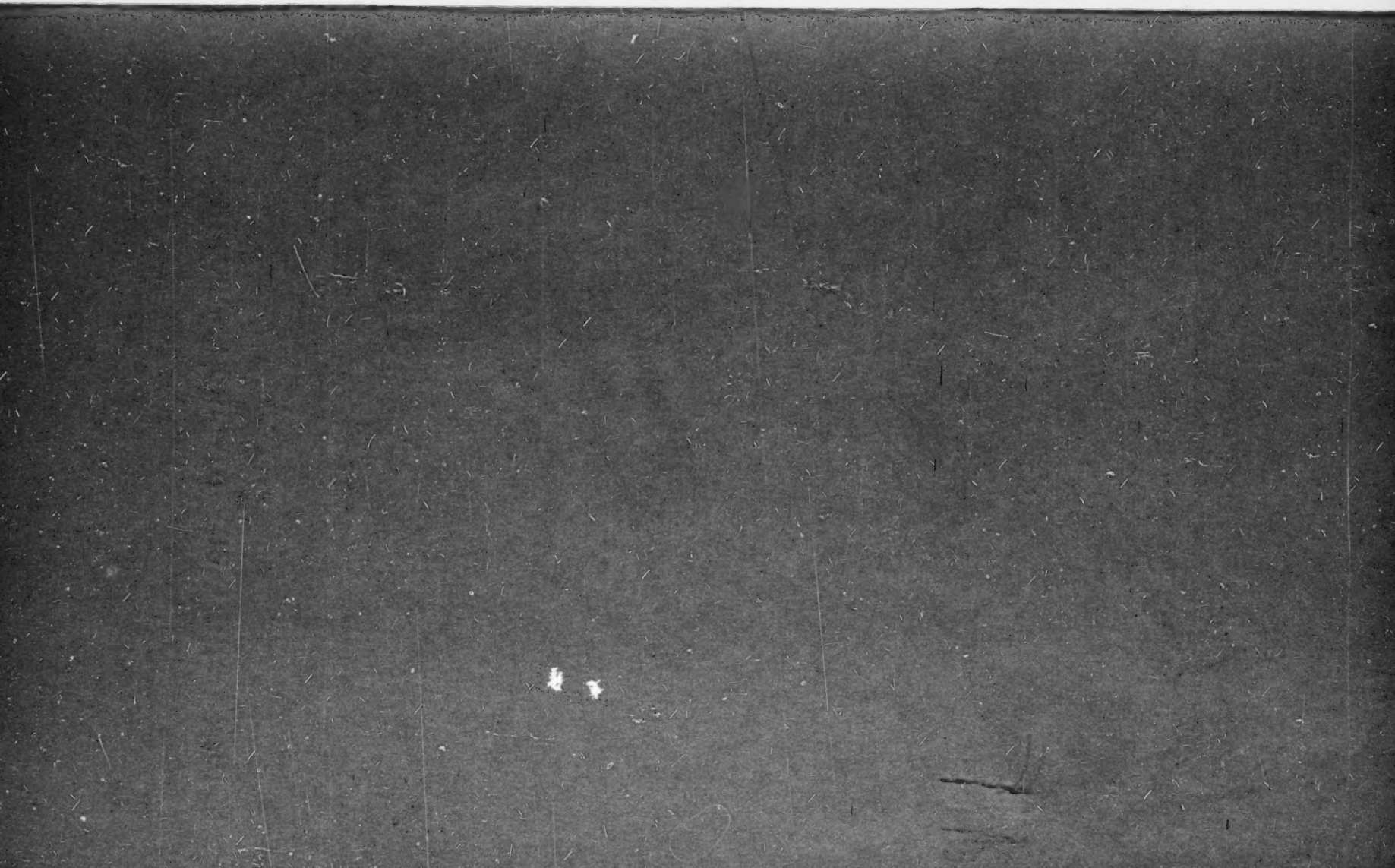
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN O. CHARRIER, JR.
JEANMARIE LOCOCO
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE & DENEGRE
50th Floor
201 St. Charles Avenue
New Orleans, LA 70170
Telephone: (504) 582-8000

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831



QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit was correct in affirming the District Court's judgment notwithstanding the verdict on the issue of Petitioner's lack of seaman status for the purpose of asserting a remedy under the Jones Act, 46 U.S.C.A. 688.

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STATEMENT OF THE CASE

The facts of the case are stated in the opinion of the Court of Appeals, 812 F.2d at 978-979 (Petitioner's Appendix A, pp. A-6 through A-9).

REASONS FOR DENYING THE WRIT OR ALTERNATIVELY, FOR SUMMARY DISPOSITION AFFIRMING THE DECISIONS OF THE COURTS BELOW

I. Petitioner has not demonstrated any "special and important reasons" warranting the exercise of this Honorable Court's discretionary power of review, as described in U.S. Sup.Ct.Rule 17, 18 U.S.C.A.

II. The decisions below are in full accord with the principles expressed in decisions of this court, and the Court of Appeals correctly interpreted the Longshore and Harbor Workers Compensation Act (LH WCA) in holding that coverage under the LHWCA and the Jones Act is mutually exclusive.

III. The decision of the court of appeals is correct as supported by the leading case on the issue of seaman status, *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959), and its progeny.

ARGUMENT

I. No Special and Important Reasons Exist to Grant Certiorari

Noticeably absent in Petitioner's papers is any direct statement of the "special and important reasons" which

ordinarily ought to be offered in support of this Court's discretionary power of review. U.S. Sup.Ct.Rule 17, 18 U.S.C.A. Such reasons are absent from the petition and absent in fact. Certainly there is no conflict among the federal courts of appeal on this issue; neither does this case present an undecided question of federal law; nor does the decision of the Court of Appeals conflict with applicable decisions of this Court.

While Respondent recognizes that the reasons enumerated in Rule 17 are not unqualifiedly controlling and do not fully measure this Court's discretion, implicit in Rule 17 is the directive that there must be reasons of similar character to warrant the granting of certiorari. This Court has described the necessary reasons as follows:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted.] Special and important reasons imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority

between the Circuit Courts of Appeal." *Id.* at 79, quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923).

Reasons similar to those described above are absent in this case. Instead, the petition apparently rests on the grounds that (1) since in most cases questions of seaman status should be determined by the jury, and (2) since in this case the trial judge allowed the jury to consider the issue, and (3) since, thereafter, the trial judge granted a judgment notwithstanding the jury's verdict, the jury verdict had a sanctity beyond the reach of settled law. However, it is plain that status issues come in for no special treatment on motions for directed verdict or judgment n.o.v., and such a motion is well taken when there is no reasonable evidentiary basis for the jury finding. *Senko v. La Crosse Dredging Corporation*, 352 U.S. 370, 374, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957); *Golden v. Rowan Companies, Inc.*, 778 F.2d 1022 (5th Cir. 1985); *Wallace v. Oceaneering International*, 727 F.2d 421, 431-432 (5th Cir. 1984); *Boeing Company v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc).

This Court has long held that the mere right to jury trial does not negate the authority of the federal courts to direct a verdict or enter judgment n.o.v. for insufficiency of evidence. *Galloway v. United States*, 319 U.S. 372, 389, 63 S.Ct. 1077, 1086, 87 L.Ed. 1458 (1943); *See also, Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973). Although Petitioner asserts otherwise, a jury's discretion to find a worker "a member of a crew" is no greater than its discretion to

decide any other factual issue. In short, no case of this Court suggests that jury verdicts on status have greater sanctity than jury decisions of any other issue.

Indeed, this Court recently denied certiorari where precisely the same issues presented here were at stake. In *Munguia v. Chevron Company U.S.A.*, 768 F.2d 649 (5th Cir. 1985), *cert. denied* 475 U.S. 1050, 106 S.Ct. 1272, 89 L.Ed.2d 580 (1986), the plaintiff was employed as a roustabout in an oilfield consisting of six platforms located near the Mississippi River and accessible only by water. A number of small vessels provided transportation for workers and equipment in the field. Munguia's duties included working at a group of oil storage tanks called a tank battery. When he was not assigned there, he was required to work on the actual oil wells which also were only accessible by boat. Munguia traveled to the wells by boats which he piloted and for whose maintenance he was sometimes responsible. As in this case, the percentage of time spent by Munguia working on vessels, as opposed to land-based work, was an important consideration. Although the plaintiff testified that more than 90% of his activities involved piloting and working with the boats, his testimony was contradicted by other witnesses.

The jury found that Munguia was a seaman and rendered judgment in his favor. The District Court entered judgment n.o.v., the Fifth Circuit affirmed, and this Court denied certiorari. *Munguia*, 475 U.S. 1050. The Court of Appeals based its decision on the fact that the plaintiff's assignment to any particular vessel was random, was not on a continuing or regular basis, and was not substantial in point of time and work. In affirming the judgment notwithstanding the verdict, the Fifth Circuit stated:

> The jury might have found, that as contended by Munguia, his work required the ability to pilot a small boat and "more than rudimentary" knowledge of the operation and maintenance of the craft, that he had to know about currents in the river to navigate properly, and that he faced the vicissitudes of storm, injury and death while on the waters he traveled. But these are not the specific criteria by which it is determined that a worker is a member of the crew of a vessel. The *Robison* criteria are threefold: whether the worker performs a substantial amount of his work aboard a vessel; whether he is assigned more-or-less permanently to a vessel or identifiable fleet of vessels; and whether his duties contribute to the mission of the vessel.
>
> Munguia's work fails to meet at least two of three criteria: (1) he was not assigned to a fleet of vessels: instead the vessels were randomly assigned to him as a means of performing his work of servicing platforms and (2) he did not perform a substantial part of his work on the vessels. 768 F.2d at 653.

Likewise, as is more fully discussed in Section III, infra, Pizzitolo was not a member of the crew of any fleet of vessels. Rather, he was a land-based worker assigned to perform electrical repairs on any and all electrical equipment on the premises of Electro-Coal's facility, and only 25 percent, at most, of his work consisted of electrical repairs on vessels.[1] Understandably, Petitioner makes no reference to this Court's refusal to grant certiorari in *Munguia*. The case does, however, control this one: Judgment n.o.v. is

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[1] *See also, Miller v. Rowan Companies, Inc.*, 815 F.2d 1021 (5th Cir. 1987) in which the Fifth Circuit affirmed a judgment n.o.v. on the ground that the plaintiff failed to present a sufficient evidentiary basis for the jury to find that he was permanently assigned to, or performed a substantial part of his work on, the vessel.

indeed proper in status cases and none of the "special and important reasons" required by Rule 17 exist here. This Court should refuse certiorari.

II. The Decisions Below Do Not Conflict With the Decisions of This Court.

In seeking certiorari, Petitioner asserts the Court of Appeals engaged in "semantical distinction" and glaring and grievous misinterpretation when it found him covered by the Longshore & Harbor Workers Compensation Act, 33 U.S.C. § 901, et seq. (LHWCA), and not by the Jones Act. Hardly so! The Court of Appeals simply found that Pizzitolo was a traditional harbor worker and plainly fell in that category of laborer which the Act expressly identifies as a "ship repairman". Petitioner, after all, was a shore-based worker whose major assignment was maintenance of a shore-side plant and who only performed electrical repairs on vessels from time to time.

In this Court, Petitioner, as he did with the jury, narrowly focuses on certain isolated facts, choosing to present only those facts which emphasize his connection to the vessels he sometimes repaired. Petitioner's argument is reminiscent of the Indian folktale of the six blind men and the elephant. Each, unable to see the whole, made a limited examination of the elephant's anatomy and gave a wrong description. The District Court, constrained as it was by law to see with a full focus, rejected the narrow bead Pizzitolo drew on the facts and granted judgment n.o.v. The Fifth Circuit Court of Appeals correctly affirmed that ruling. It correctly also found that, in any event, viewed from any vantage point, Petitioner was a traditional harbor worker statutorily defined by the LHWCA as a ship

repairman, and one who, therefore, was not covered by the Jones Act.

The decision below is correct and is in full accord with the decisions of this Court. It is well-settled that the remedies of an employee covered by the LHWCA and those of a seaman are mutually exclusive. *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 212, n. 12, 92 S.Ct. 418, 425, n.12, 30 L.Ed.2d 383 (1971); *Swanson v. Marra Brothers, Inc.,* 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946); *Norton v. Warner Co.,* 321 U.S. 565, 570, 64 S.Ct. 747, 750, 88 L.Ed. 931 (1944). The decision of the court below was nothing more than a reiteration of the clear line of demarcation established by this Court in *Swanson* between the class of workers entitled to seamen's remedies and those whose remedies fall under the LHWCA. There, in denying a traditional harbor worker status as a seaman this Court stated:

> We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery [provided by the Jones Act] only such rights to compensation as are given by the Longshoremen's Act.

328 U.S. at 7.

Giving careful and correct analysis to the history of the LHWCA and this Court's jurisprudence, the court below concluded the obvious. A traditional harbor worker such as Petitioner whose occupation is expressly listed as one within the coverage of the LHWCA may not claim Jones Act status. That conclusion is certainly one consistent with (1) this Court's opinion in *Swanson,* (2) the

original LHWCA, (3) the LHWCA as amended and expanded in 1972, and (4) this Court's express approval of that expansion. *See Northeast Marine Terminal v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977); *Director, OWCP v. Perini North River Assoc.,* 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983).

The decision below is also consistent with reality. In this Court, Petitioner claims that he is not a longshore worker but one who "from the outset [has] sought his remedy" under the Jones Act. In fact, from the outset Pizzitolo has been paid benefits as a longshore worker under the LHWCA. Moreover, the present litigation was not instituted until 19 months after Petitioner's accident, a period during which Petitioner was provided medical care and weekly payments all under the LHWCA. And so far as Respondent knows, Petitioner continues to receive those benefits now.

Finally, the decision below properly applies the well-settled "mutually exclusive" principle. *See e.g. Balfer v. Mayronne Mud & Chemical Co.,* 762 F.2d 432 (5th Cir. 1985); *Buras v. Commercial Testing & Engineering Co.,* 736 F.2d 307 (5th Cir. 1984); *Thomas v. Peterson Marine Service, Inc.,* 411 F.2d 592 (5th Cir. 1969). Accordingly, it was proper for the court below to hold that there was no reasonable evidentiary basis for the jury's finding. Indeed, the decision of the court below is nothing more than a restatement of the well-settled line of demarcation between the seaman's and the longshore worker's remedies. As one commentator has pointed out, the Fifth Circuit has a solid history of deciding seaman status issues. *Robertson,* "Current Problems In Seaman's Remedies: Seaman

Status, Relationship Between Jones Act and LHWCA, and Unseaworthiness Actions By Workers Not Covered by LHWCA", 45 La.Law Rev. 875, 877-892. And, the Fifth Circuit Court of Appeals has, in the challenged decision, taken an approach which neither ignores any mandate of this Court, nor misinterprets the intent of Congress. Certiorari should be denied.

III. The Decision of the Court of Appeals is Correct under the Robison Test

Among Petitioner's arguments is one that the Court of Appeals was incorrect in failing to use its traditional analysis to determine whether there was a reasonable evidenitary basis for the finding that he was a seaman. However, even when applying such an analysis, the result reached by the Court of Appeals is plainly correct.

In *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959), the Fifth Circuit Court of Appeals analyzed the various decisions of this Court on the issue[2] and homogenized them into its time-honored test for seaman status. Under the *Robison* formula:

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[2] See, *Butler v. Whiteman,* 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed. 2d 754 (1958); *Grimes v. Raymond Concrete Piling Co.,* 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737 (1958); *Gianfala v. Texas Co.,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955); *Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957); *Desper v. Starved Rock Ferry Co.,* 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205 (1952); *Norton v. Warner Co.,* 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944); *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 (1940).

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured worker was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed are the duties he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779. The two prongs of this test are conjunctive; both must be met. In the instant case, Pizzitolo failed to meet the first prong; therefore, there was no evidentiary basis to support his claim of seaman status. And, although the Court below did not use the *Robison* analysis in reaching its results, its decision is, nonetheless, correct and well supported by *Robison* and its progeny.

In order to fulfill the requirement of permanency or substantiality, it was Pizzitolo's burden of proving that he performed a significant part of his work aboard a vessel or vessels with at least some degree of regularity and continuity. *Barrett v. Chevron U.S.A. Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986), (en banc). The necessary relationship has been described as one "evincing a vessel relationship that is substantial in point and time and not merely spasmodic." *Id.* at 1074, quoting *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 247 (5th Cir. 1983). The injured worker must have "more than a transitory connection" with a vessel or group of vessels. *Id.* Furthermore, incidental and temporary duty aboard a vessel is insufficient to fulfill the substantiality requirement. *Billings v. Chevron U.S.A. Inc.*, 618 F.2d 1108, 1110 (5th Cir. 1980); *Keener v. Transworld Drilling Co.*, 468

F.2d 729, 732 (5th Cir. 1972). Fortuitous and random assignments to work aboard vessels are insufficient to render a worker a seaman. *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307, 310 (5th Cir. 1984); *Kirk v. Land & Marine Applicators*, 555 F.2d 481, 483 (5th Cir. 1977).

Moreover, where the worker's duties aboard vessels are only incidental to his primary land-based responsibilities, or where such duties are irregular and fortuitous, the worker is not a seaman. *Wallace v. Oceaneering International*, 727 F.2d 427, 434 (5th Cir. 1984). Personnel who are primarily shoreside or landbased workers and whose tasks aboard a vessel are an incidental or casual part of their overall tasks are not seamen. See, e.g., *Bouvier v. Krenz*, 702 F.2d 89 (5th Cir. 1983); *Billings v. Chevron U.S.A. Inc.*, 618 F.2d 1108 (5th Cir. 1980); *Guidry v. Continental Oil Co.*, 614 F.2d 447 (5th Cir. 1981); *Fazio v. Lykes Bros. S.S. Co.*, 567 F.2d 301 (5th Cir. 1978); *Bazile v. Bisso Marine*, 606 F.2d 101 (5th Cir. 1979); *Jones v. Mississippi Grain Elevator Co.*, 703 F.2d 108 (5th Cir. 1983); *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307 (5th Cir. 1984); *White v. Valley Line Co.*, 736 F.2d 304 (5th Cir. 1984). Moreover, those who come aboard a vessel or vessels for isolated pieces of work are not seamen. *Bertrand*, 700 F.2d at 246; *White*, 736 F.2d at 306.

In the instant case, it is uncontested that the electricians, including the Petitioner, went aboard a vessel to perform a specific task, then upon completion of the task received another assignment from the foreman of the electrical crew. The task itself could take one hour or three hours or one day or up to three days. However, when the task was completed, Petitioner was assigned to other tasks

either on the shore or on the dock of Electro-Coal's plant. No more than 25 percent of Pizzitolo's total time at work was spent doing vessel repairs. Not insignificantly, Pizzitolo's accident occurred on the dock.

On the issue of substantiality, the percentages of time which Pizzitolo spent working aboard vessels is a relevant consideration. *Munguia,* 768 F.2d at 651; *Barrett,* 781 F.2d at 1076; *Bouvier,* 702 F.2d at 91; *Abshire v. Seacoast Products, Inc.,* 668 F.2d 832, 835 (5th Cir. 1982). In this case, at least 75 percent of the plaintiff's work was shore-based and consisted of the repair of electrical equipment on land. The Fifth Circuit has yet to hold that *any* worker who spent 25 percent or less of his time working aboard vessels fulfills the substantiality requirement for seaman status. For example, in *Barrett,* the Fifth Circuit held that an injured welder's helper was not a seaman. The plaintiff was a member of a welding crew assigned to perform welding operations on a caisson located in an oilfield in the Gulf of Mexico. During the course of his employment, he performed 70 to 80 percent of his work on platforms and no more than 20 to 30 percent of his work on vessels. The Fifth Circuit, *en banc,* determined that the plaintiff did not perform a substantial part of his work aboard a vessel or fleet of vessels and, thus, was not a seaman.

Given this well-settled law, the holdings of the District Court and the Court of Appeals were both predictable and proper. There was simply no evidentiary basis for the jury's finding of seaman status. Instead, the Courts below properly looked to the characteristics of Petitioner's total employment in terms of its nature and the location in which it was carried out, *Barrett,* 781 F.2d at 1075, and properly considered all of the circumstances of Petitioner's em-

ployment to determine the relation of his vessel-related activities to his total responsibilities, *Longmire v. Sea Drilling Corporation,* 610 F.2d 1342, 1347 (5th Cir. 1980). The circumstances in this case lead solely and directly to the conclusion that Pizzitolo was a harbor worker/ship repairman and not a seaman.

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CONCLUSION

Respondent, Electro-Coal Transfer Corporation, respectfully submits that the petition for writ of certiorari filed by Nicholas R. Pizzitolo should be denied. Alternatively, Respondent submits that summary affirmation of the decision below is appropriate.

Respectfully submitted,

JOHN O. CHARRIER, JR.
JEANMARIE LOCOCO
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE & DENEGRE
201 St. Charles Avenue
50th Floor
New Orleans, LA 70170
Telephone: (504) 582-8000

Attorneys for Respondent

APPENDIX: LISTING OF PARENT, SUBSIDIARY AND AFFILIATE COMPANIES OF ELECTRO-COAL TRANSFER CORPORATION, PURSUANT TO SUPREME COURT RULE 28.1

Electro-Coal Transfer Corporation
Teco Energy, Inc.
Teco Finance, Inc.
Teco Investments, Inc.
Tampa Electric Company
Teco Diversified, Inc.
Teco Properties Corporation
Teco Coal Corporation
Teco Transport & Trade Corporation
Teco Power Services Corporation
Termco, Inc.
Catliff Coal Company
Rich Mountain Coal Company
Gulfcoast Transit Company
Mid-South Towing Company
Teco Towing Company
G C Service Company, Inc.